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Nos. 94-1614, 94-1631 and 94-1985

IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

STATE OF WISCONSIN,

Petitioner,

vs.

CITY OF NEW YORK, *et al.*,

Respondents.

(For Continuation of Caption See Reverse Side of Cover)

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

AMICUS CURIAE BRIEF OF THE LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW, THE AMERICAN CIVIL LIBERTIES UNION, THE AMERICAN JEWISH COMMITTEE, THE NAACP LEGAL DEFENSE AND EDUCATIONAL FUND, INC., THE NEW YORK CIVIL LIBERTIES UNION and THE PUERTO RICAN LEGAL DEFENSE AND EDUCATION FUND, INC. IN SUPPORT OF RESPONDENTS

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(For Further Appearances See Reverse Side of Cover)

25 pp

STATE OF OKLAHOMA,

Petitioner,

vs.

CITY OF NEW YORK, *et al.*,

Respondents.

UNITED STATES DEPARTMENT OF COMMERCE, *et al.*,

Petitioners,

vs.

CITY OF NEW YORK, *et al.*,

Respondents.

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INTEREST OF AMICI[1]

Lawyers' Committee for Civil Rights Under Law

The Lawyers' Committee for Civil Rights Under Law (Lawyers' Committee) is a non-profit organization created in 1963 at the request of the President of the United States to involve private attorneys throughout the country in the national effort to assure equal rights to all Americans. Protection of the voting rights of citizens has been an important aspect of the work of the Lawyers' Committee. The Lawyers' Committee has provided legal representation to litigants in numerous voting rights cases throughout the nation over the last 30 years, including cases before this Court, *see, e.g., Clark v. Roemer,* 500 U.S. 646 (1991); *Clinton v. Smith*, 488 U.S. 988 (1988); and *Connor v. Finch*, 431 U.S. 407 (1977). The Lawyers' Committee has also participated as *amicus curiae* in other significant voting rights cases in this Court, *see, e.g., Thornburg v. Gingles*, 478 U.S. 30 (1986) and *City of Mobile v. Bolden*, 446 U.S. 55 (1980).

American Civil Liberties Union and New York Civil Liberties Union

The American Civil Liberties Union (ACLU) is a nationwide, nonprofit, nonpartisan organization with nearly 300,000 members dedicated to the principles of liberty and equality embodied in the Constitution. The New York Civil Liberties Union is its statewide affiliate. Since its founding in 1920, the ACLU has sought to ensure that people whose constitutional or statutory rights have been denied by the government or by government officials have an effective means of redress. The ACLU has participated directly or as *amicus curiae* in many of the cases in this Court concerning voting and/or equal rights.

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[1] Letters of consent to the filing of this brief have been lodged with the Clerk of the Court pursuant to Rule 37.3.

American Jewish Committee

The American Jewish Committee (AJC) is a national organization that was founded in 1906 to protect the civil and religious rights of Jews. AJC has always believed that these rights can be secure for Jews only when the rights of Americans of all faiths, races and ethnic backgrounds are equally secure. That is why AJC strongly believes that the census undercount must be corrected. Unless it is corrected, the constitutional rights of those not counted, disproportionately black and Hispanic residents of large cities, remain violated. Correcting the undercount is necessary to cure this egregious violation.

NAACP Legal Defense and Educational Fund, Inc.

The NAACP Legal Defense and Educational Fund, Inc. is a nonprofit organization under § 501(c)(3) of the Internal Revenue Code, which exists to provide free legal representation to African Americans and others who are subject to discrimination in violation of the United States Constitution and other laws. Since its establishment in 1940, it has developed a reputation for expertise in civil rights litigation through the many cases in which it has provided representation, including *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954) (school desegregation); *Katzenbach v. McClung*, 379 U.S. 294 (1964); *Allen v. State Bd. of Elections*, 393 U.S. 544 (1969) (voting rights); *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1 (1971) (school desegregation); *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971) (employment discrimination); *White v. Regester*, 422 U.S. 935 (1975) (voting rights); *City of Mobile v. Bolden*, 446 U.S. 55 (1980) (voting rights); *Thornburg v. Gingles*, 478 U.S. 30 (1986) (voting rights). *See also NAACP v. Button*, 371 U.S. 415, 422 (1963) (describing Legal Defense Fund as a "'firm' . . . which has a corporate reputation for expertness in presenting and arguing the difficult questions of law that frequently arise in civil rights litigation").

Puerto Rican Legal Defense and Education Fund, Inc.

Since its inception in 1972, the Puerto Rican Legal Defense & Education Fund, Inc. (PRLDEF) has worked to politically empower the Puerto Rican and Hispanic community. PRLDEF has represented Latinos in many cases protecting and furthering their voting rights. The issues presented in this appeal concerning the census undercount are central to protecting the constitutional and statutory rights of the Latino community. The underrepresentation of Latinos in Congress will never be fully addressed until the undercount of Latinos by the census is remedied.

STATEMENT OF CASE

Since its inception, the decennial census has historically undercounted the number of people in the United States. It has also historically undercounted racial and ethnic minorities at a greater rate than non-minorities. For at least the last five censuses, the historic undercount of minorities has been well documented and has continued, largely unchanged, decade after decade. Currently, certain minorities—specifically, African-Americans, Hispanics and American-Indians—are being undercounted at a rate twice that of whites. The protracted and sophisticated efforts of the Census Bureau and this litigation were undertaken in an effort to prevent another undercount in the 1990 census, or, if prevention was impossible, to ensure that a reliable method was developed and utilized to correct that undercount.

By the spring of 1987, the Bureau of the Census developed a method by which the decennial census could be adjusted to correct the undercount. The parties agree that the method, known as the Post-Enumeration Survey, or PES method, increases the numerical accuracy of the census and alleviates the undercounting of minorities. The disputed question is whether the PES method is at least as distributively accurate as the unadjusted census. The Director of the Census Bureau, the agency that conducts the decennial census, recommended to the Secretary of Commerce that, because of

the adjusted census' increased accuracy, the adjustment method in calculating the 1990 census should be used. She was joined in this recommendation by a majority of the Undercount Steering Committee and other experts.

Notwithstanding the recommendation of the Census Bureau, the then-Secretary of Commerce, Robert Mosbacher, refused to adjust the census. He based his decision on a series of conclusions. He conceded that the adjustment would improve numerical accuracy and reverse the historically skewed undercount of racial and ethnic minorities. He questioned the improvements that would be achieved in distributive accuracy by adjustment. His final conclusion was that the proponents of adjustment—the vast majority of the Census Bureau experts—had not met their burden of proving the superiority of the adjustment. Thus, the 1990 census as presented to the President failed to account for more than 5 million persons, including 5% of the country's African-Americans, Hispanics and American-Indians. The District Court, applying a deferential standard, did not explicitly state which method would be most accurate, but implied that it agreed with the Census Bureau experts and stated that if called upon to review the issue *de novo* would order adjustment. *City of New York v. U.S. Dept. of Commerce*, 822 F. Supp. 906, 928 (E.D.N.Y. 1993). The Court of Appeals concluded that the record showed that the adjusted census would improve numerical accuracy, cure the undercount, and would not, at least, hinder distributive accuracy. *City of New York v. U.S. Dept. of Commerce*, 34 F.3d 1114, 1130-31 (2d Cir. 1994). Accordingly, it remanded the case to the District Court to review the Secretary's decision not to use the PES method under a non-deferential standard.

SUMMARY OF ARGUMENT

Equal representation is the foundation of our representative democracy. The decennial census is an essential component of the right to equal representation because it is the basis for the apportionment of members to the House of Repre-

sentatives and the drawing of state and local representative districts. Because the census is determinative of equality of voting rights, Art. I, § 2 requires a decennial census that is as accurate as practicable. Thus, the issue presented to this Court is whether the Secretary of Commerce's decision regarding the census, one that impacts directly on the one-person, one-vote principle that this Court has fiercely protected, will be subject to meaningful judicial review.

Amici argue that the census is of such critical importance that its accuracy cannot be left solely to the discretion of the political branches. It must be subject to a greater degree of judicial scrutiny than the "arbitrary and capricious" standard employed by the District Court. To subject the accuracy of the census to meaningful judicial review means that, on remand, the District Court should determine whether the Secretary acted in objective good faith to ensure a census that is as accurate as practicable.

Petitioners argue that such a degree of judicial review is not necessary because the Secretary determined that there was no violation of the constitutional right to equal representation, since, in his view, the adjusted census did not increase distributive accuracy. Amici argue that this critical decision affecting constitutional rights should not be left to the Secretary alone to decide.

Petitioners urge the Court to create a rule of deference so generous as to make the Secretary's decisions largely unreviewable. Amici contend that any census requires value-laden decisions that will have a significant effect on the accuracy of any count. There are three reasons why the courts should be involved in ensuring accuracy. First, the courts' role in analogous contexts shows that the courts can and have proven successful in counterbalancing the majoritarian impulses of the political branches. Prior to *Baker v. Carr*, 369 U.S. 186 (1962) and *Reynolds v. Sims*, 377 U.S. 533 (1964), redistricting decisions by then majoritarian rural legislators failed to sufficiently protect the interests of those living in suburban and urban areas. The involvement of the courts has been critical, and successful, in abolishing those practices.

Second, there is a long-standing history of majoritarian branches of government tolerating an undercount of certain minority citizens. In the census counts, without judicial review, decisions by the executive branch failed to sufficiently protect the interests of blacks, Hispanics and Native Americans. The political branches of government, after five or more decades, have yet to adopt a corrective methodology. Third, because all methodologies, whether using adjusted numbers or unadjusted numbers, contain a myriad of value judgments often masked as "technical," the most effective method of assuring that a count is done as accurately and as value free as possible is to expose the decisions of the political branch to the searching inquiry provided by cross examination and court review.

This Court has long required the government to attempt in good faith to provide the constitutional requirement of equality of representation in a manner that is as accurate as practicable. Because the census directly bears on equal representation, the political branches delegated with the authority to undertake the census must also attempt in good faith to make it as accurate as practicable. Notwithstanding Petitioners' assertions to the contrary, neither Amici nor Respondents are demanding a mathematically precise census or the adoption of impractical methods of calculating the census. However, if the Secretary has at his disposal a practicable method to accurately calculate the census, which also alleviates the historic undercounting of minorities, and fails to adopt such a method, his action cannot be deemed to have been taken in good faith, regardless of his subjective intent. It is undisputed that the PES methodology is practicable and that it corrects the historic undercount of racial and ethnic minorities. What is left for the lower court to decide is whether it provides the most accurate census. Thus, the Court should affirm the Court of Appeals' remand of this case to the District Court to determine if the Secretary chose the method that provides for the most accurate census.

The census data forms the crux of our representational government. It is also used to determine a variety of other

matters affecting the distribution of resources and opportunities. For these reasons, an accurate census is of fundamental importance. It is particularly critical for racial and ethnic minorities, groups that historically have been underrepresented in the political process and which are most in need of sufficient representation and funding. To permit the Secretary's decision not to adjust the census to stand without meaningful judicial review is to acquiesce in the devaluation of certain members of our society. This Court must not permit the continued diminishment of any person's worth in this manner.

I

BECAUSE THE DECENNIAL CENSUS DIRECTLY IMPACTS ON FUNDAMENTAL CONSTITUTIONAL RIGHTS, THE SECRETARY'S DECISION MUST BE SUBJECT TO MEANINGFUL JUDICIAL REVIEW.[2]

A. Because the Decennial Census Directly Affects the Right to Equal Representation, Art. I, § 2 Requires A Census That Is As Accurate As Practicable

The appropriate method by which to determine the most accurate decennial census of the nation's population directly impacts on the fundamental right to equal representation, a right that forms the very core of this country's democracy. Article I, section 2 of the United States Constitution requires allocation of Representatives among the several States "according to their respective numbers." This rule of apportionment was reached after lengthy debate at the Constitutional

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[2] Amici agree with the position of Respondents that the challenge to the Secretary's decision not to use the adjusted census is justiciable, the Census Act does not bar statistical adjustment of the census, and there is no issue with respect to standing, for the reasons enumerated by the District Court and Court of Appeals. *See also Franklin v. Massachusetts*, 112 S. Ct. 2767, 2776 (1992) ("Constitutional challenges to apportionment are justiciable").

Convention of 1787 at which it was decided that a democratic allocation of political power was the only means of establishing a legitimate government. As James Madison succinctly declared, "If the power is not immediately derived from the people, in proportion to their numbers, we may make a paper confederacy, but that will be all." 3 The Records of the Federal Convention of 1767 (Farrand ed. 1911) 14; *see also Wesberry v. Sanders,* 376 U.S. 1, 10 (1964). A representative branch of the legislature was therefore created, with the proviso that because the House "should represent 'people,' . . . in allocating Congressmen, the number assigned to each State should be determined solely by the number of the State's inhabitants." *Wesberry,* 376 U.S. at 13.

To ensure that the House of Representatives would be fairly apportioned among the States on a current basis, a periodic census was proposed and adopted into the Constitution. Art. I, § 2, cl. 3; *see also Wesberry,* 376 U.S. at 13 (noting that Framers endorsed proposal of periodic census as means of "assuring that 'numbers of inhabitants' should always be the measure of representation in the House of Representatives"). Accordingly, Art. I, § 2, as amended by the Fourteenth Amendment, requires "counting the whole number of persons in each State" to apportion the correct number of Representatives. The census was employed to guarantee that entrenched interests in the House would not obstruct necessary reapportionment. *Franklin v. Massachusetts,* 112 S. Ct. 2767, 2771 (1992) (*quoting* S. Rep. No. 2, 71st Cong., 1st Sess., 2-3 (1929)) ("The need for [an automatic census] is confessed by the record of the past nine years during which Congress has refused to translate the 1920 census into a new apportionment. . . . As a result, great American constituencies have been robbed of their rightful share of representation.").

In our representative democracy, the complement to the equal apportionment of Representatives among the States is the equal apportionment of Representatives within a State. Equal representation cannot be had if the distribution of Representatives within a State is not equally divided because each person's vote would not have equal power. *See Wesberry,* 376

U.S. at 7-8 (in striking down apportionment of congressional seats based on wildly divergent districts, Court noted that the "Constitution's plain objective was that of making equal representation for equal numbers of people the fundamental goal"). The decennial census directly impacts upon the right to equal representation, embodied in the one-person, one-vote rule, because it is the basis upon which congressional districts within a state are drawn. The one-person, one-vote principle, which this Court has jealously guarded, is acutely affected by a less than accurate census because the distribution of Representatives within a State will not be accurately made. *See Karcher v. Daggett,* 462 U.S. 725, 738 (1983) (because the census count is the best population data available, "it is the only basis for good faith attempts to achieve population equality").

The danger that inaccuracies in the census will result in unequal congressional districts within a State is particularly acute in states with districts that have a high concentration of minority residents, as the census severely undercounts minorities by as much as 5 percent. This places the burden of underrepresentation squarely on the shoulders of those persons who have the least power in the political process and consequently the greatest need for adequate representation. Furthermore, in such a district, the votes of the citizens would not have weight equal to that of other districts, and the constitutional goal of equal representation for equal numbers would not be met. As this Court noted in *Reynolds v. Sims,* the "right of suffrage can be denied by . . . dilution of the weight of a citizen's vote just as effectively as by wholly prohibiting the free exercise of the franchise." 377 U.S. 554, 555 (1964).

Because the decennial census mandated by the Constitution lies at the heart of our representative democracy, Art. I, § 2 requires that the decennial census be as accurate as practicable. *See Franklin,* 112 S. Ct. at 2785 (Stevens, J., concurring) (noting that the statutory command of Art. I, § 2 "embodies a duty to conduct a census that is accurate and that fairly accounts for the crucial representational rights that depend on the census and the

apportionment"); *Karcher,* 462 U.S. at 731 ("Adopting any standard other than population equality, *using the best census data available,* would subtly erode the Constitution's ideal of equal representation."). (Emphasis added).[3] Only an accurate census can ensure the right to equal representation through the one-person, one-vote principle. The close relationship between the census and the allocation of Representatives among the states and within a state therefore requires that decisions affecting the census be held to the same good-faith standard as those bearing on congressional districting. As the Court of Appeals declared below, the "federal government, no less than the states, is required to make a good-faith effort to achieve the Constitution's plain objective of equal representation." *City of New York v. U.S. Dept. of Commerce,* 34 F.3d at 1129.

B. *An Accurate Decennial Census Is Crucial Because It Affects The Allocation Of Federal Funds, Resources and Opportunities*

An accurate decennial census is also of fundamental importance because census data is used for myriad purposes, which, although not directly implicating constitutional rights, are essential. These purposes include the allocation of federal funds to states, cities and school districts for education, health, transportation, housing, community services, and job training. The census is also used to determine the just implementation of federal programs.[4] It constitutes "one of the most important sources of U.S. data for basic and applied social

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[3] The Federal Petitioners concede this requirement in their brief when they state that Congress has a "constitutional responsibility to make an actual enumeration of the population." (Brief of Federal Petitioners, at 28).

[4] Some instances where census data are used for federal funding and programs include the following:

- The Voting Rights Act requires the collection of census data to determine the implementation of bilingual voting programs to protect the rights of language minorities.

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research"; areas of research that utilize census data include race relations, the criminal justice system, education, poverty and the aging of the population.[5] In addition, census data serves many business uses, including the determination

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- The Elementary and Secondary Education Act specifically mandates that the U.S. census collect data on the poverty status of school-age children for the purpose of allocating funds to school districts.

- The Bureau of Economic Analysis relies on census data to develop income estimates for regional, state and local areas, which estimates, in turn, are used in funding formulas that allocate federal funding for Medicaid and AFDC.

- The Department of Agriculture obtains census data by state and county to determine the number of women, children and infants whose families have incomes below the maximum income limit for the Special Supplemental Nutrition Program for Women, Infants and Children (WIC).

- The Department of Justice, Immigration and Naturalization Service uses census data to plan and evaluate immigration policy.

- The Equal Employment Opportunity Commission uses census labor force data to analyze statistical evidence in class action charges of employment discrimination.

- The Department of Transportation uses census data to monitor compliance with the Federal Transit Act and the Americans with Disabilities Act.

- The Department of Agriculture uses census data to allocate grant funds and determine loan interest rates for assistance programs.

Modernizing the U.S. Census 24, 444 (Barry Edmonston and Charles Schultze, eds., National Research Council, Committee on National Statistics). This list represents only a fraction of the federal funds and federal programs that rely on the decennial census data.

[5] *Id.* at 259.

of where to construct hospitals and health clinics and the placement within communities of banks, other financial institutions, and community service providers.[6]

Since the decennial census affects the allocation of federal and state funds, resources and opportunities, it is imperative that the census be as accurate as practicable.

C. *Meaningful Review By The Courts Is Necessary To Ensure That The Most Accurate Means of Computing The Census Is Used*

Art. I, § 2's "high standard of justice and common sense" — "equal representation for equal numbers of people," *Karcher*, 462 U.S. at 730 — is breached when the census by which Representatives are to be apportioned is found to be inaccurate. Because an accurate census directly bears on the fundamental constitutional right of equal representation, critical decisions concerning its accuracy must be subject to meaningful judicial review.

As the Court of Appeals correctly noted, the Secretary's decision not to use the adjusted census should be reviewed under a more meaningful standard than the arbitrary and capricious test. Rather, because an accurate census represents the keystone to our constitutional democracy and to the "equal right to vote" secured by Article I, § 2, the Secretary's decision must be subjected to an exacting standard of judicial scrutiny. As the long history of cases involving apportionment and the right to vote has proven, this Court has repeatedly seen that political branches do yield to the temptation to undercount those not in the majority, whether geographically or ethnically. The Court has therefore indicated that deference to political branches is not warranted when a constitutional right is at stake. *See, e.g., Baker v. Carr*, 369 U.S. 186 (1962) (rejecting Tennessee legislators' contention that apportionment should not be reviewed by the courts); *Gray v. Sanders*, 372 U.S. 368 (1963) (invalidating Georgia primary system which gave greater weight to rural votes than urban votes); *Wesberry v. Sanders*, 376 U.S. 1 (1964) (confirming concept that right to vote

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[6] *Id.* at 292-300.

is "too important in our free society to be stripped of judicial protection" by precluding judicial review of state congressional apportionment schemes); *Reynolds v. Sims*, 377 U.S. 533 (1964) (striking down an Alabama scheme that created wildly disparate state legislative districts); *Kirkpatrick v. Preisler*, 394 U.S. 526 (1969) (holding that Missouri congressional redistricting plan creating disparate districts did not meet the "as nearly as practicable" constitutional standard); *Karcher v. Daggett*, 462 U.S. 725 (1983) (rejecting New Jersey's congressional districting plan in which districts varied by size by less than 1% because the plan failed to meet a "good-faith" standard of equality). This Court's insistence on a judicial role in these cases has been phenomenally successful in protecting the right of all people to an equal say in government.

These cases demonstrate that independent review by the Court is essential for the meaningful implementation of important constitutional rights. *See also Sable Communications v. FCC*, 492 U.S. 115, 129 (1989); *Landmark Communications v. Virginia*, 435 U.S. 829, 843 (1978). As explained above, because the decennial census is the basis upon which states create congressional districts, an inaccurate census affects the one-person, one-vote principle just as acutely as when districts are widely skewed or when reapportionment is refused. Because equal representation cannot be had without an accurate census, this Court should not recoil from exercising its independent review here, just as it did not hesitate to intervene to ensure the continued health of the one-person, one-vote principle in the redistricting cases. The one-person, one-vote mandate will have little meaning if the underlying census is not as accurate as practicable.

There is an additional, powerful reason for meaningful review in this case. The decision by the Secretary of Commerce has a serious and adverse impact upon racial and ethnic minorities—groups that have traditionally needed judicial protection from the majority. Undercounting certain members of the population—in essence, denying their existence—is especially noxious when it disproportionately and negatively affects racial and ethnic minorities who have histori-

cally been prevented from full participation in the political process. H.R. Rep. No. 439, 89th Cong., 1st Sess., report at 1965 U.S.C.C.A.N. 2437 (legislative history of Voting Rights Act of 1965 noted long history of discrimination against African-Americans in the political process and the need for judicial intervention in striking down discriminatory policies due in part to the intransigence of elected officials). Within our constitutional system, the judiciary has long served as the institution designed to counter and to ameliorate the excesses of pure majoritarianism. *See, e.g., Plyler v. Doe,* 457 U.S. 202 (1982) (invalidating state law denying education to children of illegal aliens); *Shapiro v. Thompson,* 394 U.S. 618 (1969) (striking state law requiring recipients of welfare assistance to reside in state for at least one year). So understood, this Court has long recognized the responsibility of the judiciary to protect minority interests in circumstances where the decisions of the political branches of government skew outcomes unfairly in the interests of the dominant majority. *See Reynolds v. Sims,* 377 U.S. 533 (1964); *Wesberry v. Sanders,* 376 U.S. 1, 10 (1964); *Gray v. Sanders,* 372 U.S. 368 (1963) (invalidating Georgia primary system giving greater voting power to rural residents than urban residents); *Gomillion v. Lightfoot,* 364 U.S. 339 (1960) (invalidating gerrymandering of districts favoring white majority).

While equal protection claims challenging racial classifications require proof of intentional discrimination, *see Adarand Constructors, Inc. v. Pena,* 115 S. Ct. 2097 (1995); *Washington v. Davis,* 426 U.S. 229 (1976), and no such claim is presented here, this Court need not be totally blind to the disproportionate undercount of African-Americans, Hispanics, and Native Americans for purposes of evaluating the Article 1, § 2 claim.[7] While the right to a census that is as "accurate as practicable" is one of general application, its trans-

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[7] Amici do not argue that the Court should depart from its established approach to equal protection analysis for purposes of evaluating claims of racial discrimination. While the Court of Appeals referred to the racially

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gression has a particular impact upon minority groups. Already often submerged within the political process, minority groups bear other difficulties when they are not counted in the most effective manner in the census process.

Judicial review is also required because the recipients and beneficiaries of federal funds and programs affected by the census are, to a large extent, racial and ethnic minorities. Thus, there is a danger that the use of a less than accurate census may deprive those most in need of funding and assistance as well as dilute their voting power.

Federal Petitioners have conceded that the census disproprotionately and negatively impacts on racial and ethnic minorities. The Secretary admitted that the census historically has undercounted minorities to a far greater extent than for non-minorities; for African-Americans and Hispanics, the census undercounted the population more than twice as much as the undercount for whites. The Census Bureau clearly considered the undercount to be significant; as the Bureau Director declared in recommending adjustment to the decennial census, "[i]t is time to correct this historical problem [of undercounting minorities]. . . .With the increasing diversity of the country . . . the problem could be larger in 2000." The Secretary also admitted that the Bureau had created a methodology that would finally end the historic undercount and provide a more accurate count of minorities in the United States.

Undercounting the national population is a significant concern. As the Bureau Director stated in her recommendation to use the adjusted census, "not adjusting would be denying that . . . 5 million persons exist. That denial would be a greater inaccuracy than any inaccuracies that adjustment may introduce." When the undercount disproportionately affects

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disproportionate impact of the failure to utilize the adjusted census, this case can be resolved under Article I, § 2. Thus, while minorities may have a particular interest in insuring that Art. I, § 2 is enforced, they need not make out a claim of discriminatory intent to protect that interest.

racial and ethnic minorities who have long been underrepresented in the political process, it is particularly grave. That the government would choose not to employ a method that would correct the historic undercount simply to maintain a "200 year tradition of counting people" is offensive and the message it imparts—minorities are not important enough to be counted—must not be countenanced.

The Federal Petitioners concede that meaningful judicial review would be required if the Secretary's decision had a negative impact on the constitutional guarantee of equal representation: "[a]bsent unequivocal evidence that an adjustment would have improved the distributive accuracy of the census, there is no constitutional basis upon which a court could set aside the Secretary's determination that no adjustment was warranted." (Brief at 24). However, federal appellants contend that judicial review is not mandated here because no constitutional right was implicated. They base this argument on the Secretary's decision that, in his view, distributive accuracy was not improved by adjusting the census and that therefore the right to equal representation was not affected. In effect, Petitioners would have this Court abdicate its role of determining whether a constitutional violation occurred to the Secretary's conclusion that no constitutional rights were violated. Amici disagree with this position for two reasons. First, Amici do not concede that the adjusted census would not improve distributive accuracy. The accuracy of the PES method is the question to be determined by the lower court on remand. More importantly, the determination of whether a constitutional right has been violated cannot be left within the discretion of the political branches. Rather, that is precisely the type of issue for the courts to decide.

The federal appellants also spend a great portion of their brief outlining the so-called technical questions that arise when adjustment is made in an effort to make them appear hopelessly technical and unfathomable by a non-statistician. The paradigmatic example of that effort is the discussion of "smoothing," the process by which the Bureau avoided

overadjusting. However, there was extensive testimony at trial about the "smoothing" process and, contrary to the government's suggestions, the District Court appeared perfectly capable of understanding the process and the assumptions on which it is based. More importantly, the government's argument implicitly suggests that difficult technical questions arise only when the adjustment methodology is used. That is incorrect. Value judgments and technical issues are imbedded in every decision made with respect to the use of the non-adjusted census. The government's proposed distinction between redistricting cases and unadjusted census counts on the one hand, which the government asserts involve simple arithmetic, and adjusted census counts on the other, which involves extremely technical questions, is both false and inappropriate in constitutional analysis. The degree of protection afforded ought not to depend on the difficulty of the factual questions involved.

The question is not whether technical questions abound or whether technical decisions can mask manipulation designed to favor particular groups. The question is what process is most likely to ensure that the manipulation does not occur and that facially technical decisions are not used manipulatively. In our view, meaningful judicial review is that process for three reasons. First, the open nature of court decision-making, with public trials, will better deter manipulation and guarantee accuracy than decisions made in private in executive offices. Second, the nature of court proceedings, with discovery and cross-examination, is particularly suited to teasing out and challenging hidden assumptions or masked manipulation. Third, the history of the failure of majoritarian executive and legislative branch decision-making in ensuring voting equality, and the success of court involvement in that context, demonstrates that courts have an important role to play in assuring that those branches of government do not ignore, or affirmatively manipulate, facts important to minorities, whether racial and ethnic minorities, geographic minorities, or others.

The Federal Petitioners attempt to steer this Court away from reviewing the Secretary's decision by declaring that resolution of the statistical dispute in this case "involves an exercise of technical expertise that lies uniquely within the competence of [the executive branch]." (Brief at 33). This argument is wrong for two reasons. First, courts routinely engage in technical analysis in resolving disputes of all kinds. Furthermore, the Commerce Secretary, who is admittedly not a statistician, did not perform technical analyses himself but rather relied on the judgment of various experts in reaching his decision. Second, the Secretary did not rely on his own technical advisors, the Bureau of the Census (the agency empowered by Congress to conduct the census), in reaching his decision. Rather, he rejected the Bureau's strong recommendation in favor of the adjusted census and based his decision on a number of non-technical grounds, including the preservation of the traditional method of census calculation. Thus, Petitioners' argument that this conflict is too technical for courts to determine is belied by the Secretary's own actions.

When constitutional interests are at stake, courts must not abdicate their traditional responsibility of ensuring that those interests are protected. As this Court eloquently stated in Reynolds, "a denial of constitutionally protected rights demands judicial protection; our oath and our office require no less of us." 377 U.S. at 566, 84 S. Ct. at 1384.

D. The District Court Must Determine Whether The Commerce Secretary Acted In Good Faith To Ensure A Census That Is As Accurate As Practicable

The constitutional mandate set by Art. I, § 2 that equal representation be afforded for equal numbers requires an objective good faith effort by the political branches to achieve population equality as nearly as is practicable. *Karcher,* 462 U.S. at 730, 103 S. Ct. at 2658 *(citing Kirkpatrick v. Preisler,* 394 U.S. at 530-531, 89 S. Ct. at 1228, 1229). Because the decennial census, as discussed above, directly impacts upon the right to equal representation, *Karcher's* good faith standard applies with equal force to the Secretary's decisions concerning the census. The good faith standard is an objective one. In this context it would have been met only if the Secretary chose a method of calculating the census that was as accurate as practicable.[8] Where there is a practicable method of accurately calculating the census, the Secretary must elect to use such a method. His decision not to does not meet the standard of good faith, regardless of his subjective intent.

The good faith standard and the practicable accuracy requirement are two sides of the same coin: they are concepts created in the recognition that precise mathematical precision in the equal representation context is impossible and that certain practical considerations have to be taken into account. *See Karcher v. Daggett,* 462 U.S. 725, 730 (1983); *Kirkpatrick v. Preisler,* 394 U.S. 526, 530 (1969); *Wesberry v. Sanders,* 376 U.S. 1, 7-8 (1964). While there are clearly impractical methods of determining the census that could hypothetically result in a perfect count of the population, those methods are not required by *Karcher's* good-faith standard, and Amici do not argue that the Secretary should consider them. Instead, Amici contend that because the Secretary was provided with an indisputably practicable alternative to the traditional means of taking the census, namely, the PES method, the only question that remains in the good-faith analysis is whether the PES method provides the most accurate census. If it is determined by the District Court upon remand that the PES method provides a more accurate census, then the Secretary's failure to use that method violated his good-faith obligation to ensure

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[7] Petitioners argue that *Karcher's* good faith requirement is inapplicable to the census and apportionment process because disparities between State districts would be of a "magnitude that would be unacceptable in the context of [intra]state districting policy." (Brief at 40, n. 30). This argument is untenable. Neither the Court of Appeals nor Amici expect an absolutely precise census. What the appeals court held, and what Amici argue, is that the federal government must make a good-faith effort to achieve a census and apportionment that is as accurate as possible. As the Court of Appeals declared, "[t]he impossibility of achieving precise mathematical equality is no excuse for not making this mandated good-faith effort." 34 F.3d at 1129.

equal representation and his decision not to use the adjusted census must be overturned. If it is determined that the PES method does not provide a more accurate census, then the Secretary acted in good faith in electing not to use it, because the unadjusted method provided a census that was as accurate as practicable.

Amici do not concede that the unadjusted census provides a more accurate count of the nation's population. Furthermore, if the PES methodology provides at least as distributively accurate a count as the unadjusted census and alleviates the historic undercount of racial and ethnic minorities, the Secretary's failure to use the adjusted census does not meet the good faith standard. The use of data that, by all accounts, historically undercounts racial and ethnic minorities is simply wrong. There is no rationale for its continued use if an equally accurate and more just method exists.

CONCLUSION

For these reasons, this Court should affirm the Second Circuit's remand to the District Court for review of the Secretary's decision not to use the adjusted census under the standards stated above.

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Respectfully submitted,

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